91-1844

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1991

SHERRIE VIRE, Individually and as Mother and Personal Representative of the Estate of Cassaundra Radeen Vire, deceased, and KEVIN VIRE, Individually and as Father of Cassaundra Radeen Vire, deceased,

Petitioners,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Petitioners bring an action or make an election of remedies by initiating an action in a state court that precludes them from participating in the compensation system established by the National Childhood Vaccine Injury Act of 1986 (42 U.S.C. §§ 300aa-1 et seq.)?

2. Was any defense to the petition for compensation waived because it was not raised in the answer to the petition?

3. Does the application of 42 U.S.C. § 300aa-11(a)(6) to the Petitioners violate the constitutional guarantee to equal protection of the law?

4. Does dismissal of the Petitioners' claim for compensation under the National Childhood Vaccine Injury Act violate due process under the circumstances of this case?

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OPINIONS BELOW

The decision of the Special Master in Case No. 90-84V dismissing the petition for compensation under the National Vaccine Injury Compensation Program was filed December 28, 1990, and is set forth in the Appendix at A-1. The decision and order of the United States Claims Court affirming the decision of the Special Master was filed May 13, 1991, and is set forth in the Appendix at A-7. The United States Court of Appeals for the Federal Circuit, by a per curiam unpublished order in Case No. 91-5124 entered January 13, 1991, affirmed the decision of the United States Claims Court. That order is set forth in the Appendix at A-15. All decisions in this case are unpublished.

JURISDICTION

The judgment of the United States Court of Appeals was entered January 13, 1992. This Court has jurisdiction to review that judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant parts, as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 311(a) of the National Childhood Vaccine Injury Act of 1986,

Pub. L. No. 99-660, 100 Stat. 3758 (1986), as amended and codified at 42 U.S.C.S. § 300aa-11 (Law. Co-op. 1991), is set forth in the Appendix at A-17.

STATEMENT OF THE CASE

Cassaundra Radeen Vire was born to Sherrie Vire and Kevin Vire on July 1, 1987. On December 28, 1987, Sherrie took Cassaundra to the Rogers County, Oklahoma, Health Department where a DPT vaccine was administered to Cassaundra. Within 24 hours after the vaccine, Cassaundra began experiencing incredible pain and died.

Sherrie was appointed the personal representative of Cassaundra's estate on December 27, 1988. On that same date Sherrie filed a claim for damages with

the State of Oklahoma as required by the Oklahoma Governmental Tort Claims Act, Okla. Stat. Ann. tit. 51, §§ 152 et seq. (West Supp. 1989). This claim was denied by the State in a letter dated April 5, 1989 and received by the Petitioner's counsel April 7, 1989. A petition then was filed by Sherrie as the representative of Cassaundra's estate on September 25, 1989 against the State of Oklahoma, on the relation of the Oklahoma Department of Health, for damages arising from the administration of the vaccine. However, no summonses were ever issued or served on the proposed defendants. This action was voluntarily dismissed by Sherrie on December 19, 1989.

Thereafter, a petition for compensation under the National Vaccine Injury

Compensation Program (hereafter "the Vaccine Program"), 42 U.S.C.S. § 300aa-10 et seq. (Law. Co-op. 1991), was filed by the Petitioners on January 25, 1990. No objections were made to the sufficiency of the petition and no motions were made to have it dismissed by the Respondent. At a status conference held September 25, 1990, the Special Master, to whom the petition was referred sua sponte raised the question of whether the petition for compensation was jurisdictionally barred by 42 U.S.C.S. § 300aa-11(a)(6) (Law. Co-op. Supp. 1990). After the parties filed memoranda, the Special Master entered a judgment dismissing the claim under 42 U.S.C.S. § 300aa-11(a)(6) (A-6). In ordering the Vaccine Program petition dismissed, the Special Master concluded that

"[b]y filing a civil action seeking compensation for Cassaundra's death after November 15, 1988, Sherrie Vire made an election of remedies which precludes her from pursuing the instant claim." (A-6).

The Petitioners then filed a motion for review and objections to the Special Master's decision with the United States Claims Court. In the meantime, the Petitioners refiled their action for damages arising from the administration of the vaccine in Oklahoma state court as a precautionary matter and to preserve at least some avenue of relief. This state court action has been stayed pending a final determination of the instant case. Having been advised of this at oral argument on the motion to review the Special Master's decision, the Claims Court ruled

that under 42 U.S.C.S. § 300aa-11(a)(6) the refiling of the prior suit divested the Claims Court of jurisdiction over the Petitioners' Vaccine Program compensation claim (A-13) and summarily rejected the Petitioners' other objections (A-13).

On appeal to the United States Court of Appeals for the Federal Circuit, the judgment of the Claims Court was affirmed by a per curiam order (A-16).

The United States Claims Court had jurisdiction over the Petitioners' claim for compensation under 42 U.S.C.S. § 300aa-12(a) (Law. Co-op. 1991), which provides that the Claims Court and the Claims Court special masters shall have jurisdiction over proceedings to determine if a petitioner is entitled to com-

pensation under the Program and the amount of such compensation.

ARGUMENT

I. THE PETITIONERS DID NOT BRING AN ACTION OR MAKE AN ELECTION OF REMEDIES BY INITIATING A CLAIM IN STATE COURT THAT BARS THEIR COMPENSATION CLAIM UNDER THE VACCINE PROGRAM.

Both the Claims Court and the Special Master relied upon 42 U.S.C.S. § 300aa-11(a)(6) as a basis for dismissing the Petitioners' petition for compensation under the Vaccine Program (A-4, 13). That section provides that "[i]f a person brings a civil action after November 15, 1988 for damages for a vaccine-related injury or death associated with the administration of a vaccine before November 15, 1988, such person may not file a pe-

tition under subsection (b) for such injury or death."

The Special Master indicated in his decision that the Petitioners had made an "election of remedies" by filing the their petition in state court (A-6). It is clear that the doctrine of election of remedies has no applicability here since that doctrine only applies where there are available to a claimant multiple remedies that are repugnant and require the claimant to maintain inconsistent positions. Robb v. Vos, 155 U.S. 13, 40-41 (1894); Clark v. United States, 19 Cl. Ct. 220, 223 (1990). In Peters v. Bain, 133 U.S. 670, 695 (1890), this Court stated that the election of remedies doctrine

> rests upon the principle that he who seeks equity must do it,

> and means, as the term is ordinarily used, that where two inconsistent or alternative rights or claims are presented to the choice of a party, by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other[.]

Accord Fort Vancouver Plywood Co. v. United States, 860 F.2d 409, 414-15 (Fed. Cir. 1988).

This doctrine does not apply here because there is no inconsistency between the remedies afforded to persons injured by vaccines under state law and the remedy afforded by the Vaccine Program. They are the same with the exception that the Vaccine Program does not require a claimant to prove fault. It cannot be said that the Petitioners were faced with inconsistent remedies such that the filing of the state court action is at odds

with participation in the Vaccine Program compensation system. See United States v. Rizzo, 297 U.S. 530, 534 (1936) (claim based upon internal revenue laws was distinct and consistent with previously invoked remedies under customs and navigation laws, and so was not barred by election of remedies doctrine).

Moreover, the Petitioners' conduct here in filing the state petition does not constitute an election within the meaning of that doctrine. In Haphey v. Linn County, 924 F.2d 1512, 1518 (9th Cir. 1991), the court held that "[t]he doctrine of election of remedies prevents a plaintiff who obtained one remedy from pursuing another inconsistent one. . . . Since the adaption of the Federal Rules of Civil Procedure, the doctrine of elec-

tion of remedies applies only after a judgment on one of the causes of action is entered." In United States v. Oregon Lumber Co., 260 U.S. 290, 301 (1922), this Court held that by bringing and maintaining a suit to final judgment, a party made a binding election that barred a second inconsistent claim, noting that the underlying basis of the election doctrine is to prevent one from being "twice vexed for one and the same cause." The Petitioners cannot be considered to have made an election by filing the state court petition since that action was dismissed and no judgment has yet been obtained under state law. Indeed, a binding election occurs only where one party pursues a remedy to a point where, in reliance upon such action, another party

changes his position to his detriment. United States v. Goodman, 572 F. Supp. 1284, 1288 (Ct. Int'l Trade 1983). Certainly, the Respondent here has in no way detrimentally relied upon the Petitioners' mere filing of the petition in state court, nor have any of the putative defendants in the state action been prejudiced since they initially never had notice of any possible action against them. Thus, there is nothing in the facts of this case which would indicate that the election of remedies doctrine should be applied against the Petitioners.

Even assuming state law applies, the election of remedies doctrine is still inapplicable. Oklahoma cases follow the same rule, and go even further in point-

ing out that the mere filing of a lawsuit does not constitute a binding election of a remedy. Thrasher v. Act-Fast Labor Pool, Inc., 806 P.2d 640, 643 (Okla. 1991); Beck v. Davis, 175 Okla. 623, 54 P.2d 371, 374 (1936), overruled on other grounds, Tri-State Casualty Insurance Co. v. Bowers, 113 P.2d 981, 983 (1941). As stated in Thrasher v. Act-Fast Labor Pool, Inc., supra, 806 P.2d at 643 (quoting Noble Drilling Co. v. Murphy, 131 Okla. 34, 267 P. 659, 660 (1928)), an election is defined as "'any decisive act of a party, with knowledge of his rights and of the facts, indicating an intent to pursue one remedy rather than another.'" The Petitioners' conduct in this case with respect to the petition in state court shows only that they took those

steps necessary to preserve any claim they might have against the state in accordance with the strict provisions of the state's tort claims act; the subsequent dismissal of that petition and the filing of the petition under the Vaccine Program shows that there was no decisive conduct binding them to the state remedy under the election of remedies doctrine.

Further, the Petitioners' petition for compensation under the Vaccine Program is not subject to dismissal because the conditions of 42 U.S.C.S. § 300aa-11(a)(6) do not apply under the instant facts. A claim for compensation is barred "[i]f a person brings a civil action after November 15, 1888 for damages for a vaccine-related injury or death associated with the administration of a

vaccine before November 15, 1988[.]" Id. (emphasis added). Thus, in order for this section to apply, a person must "bring a civil action" for damages for a vaccine-related injury. While Sherrie Vire did file a petition for damages against the State of Oklahoma, at no point were any summonses issued to or served upon the proposed defendants. The state court petition and action were voluntarily dismissed on December 19, 1989.

Under these facts, Sherrie Vire did not "bring a civil action" because no summonses were issued and 42 U.S.C.S. § 300aa-11(a)(6) does not apply. This is established by the decision in Foster-Milburn Co. v. Knight, 181 F.2d 949 (2d Cir. 1950), where the court considered whether an action could be transferred

from one district court to another. Judge Learned Hand, in discussing the plaintiff's claim that the action could have been "brought" in the court to which transfer was requested, stated as follows:

> That would be true, if [the transfer statute] regards the mere filing of a complaint as a bringing of the action; but it is not true, if it presupposes that the defendant can be served. We do not forget that an action is "commenced" when the complaint is filed; and it would follow, it is "brought" whenever it is "commenced," that the plaintiff is right. The inference is, however, unwarranted that [Fed. R. Civ. P. 3] meant to assimilate the filing of a complaint to the service of a summons. Apparently its primary object was to fix a limit upon the period of limitation; and that has never required the service of process, but ordinarily only the lodgement of process in the hands of the sheriff, as it still does, for example, in New York. We need not say that that is the

> only office of Rule 3, but we are satisfied that at least it does not make the filing of a complaint the equivalent of "bringing an action" under [the transfer statute].

Id. at 951-52 (emphasis added). Thus, the court ruled that "bringing an action" is not merely the filing of the complaint, but also includes the issuance of the summons. See also Schacht v. Javits, 53 F.R.D. 321, 323 (S.D.N.Y. 1971) (an action is not "brought" by simply filing a complaint, but presupposes service), and Twentieth Century-Fox Film Corp. v. Taylor, 239 F. Supp. 913, 922 (S.D.N.Y. 1965) (filing of a suit is insufficient to constitute bringing of an action).

These cases are persuasive even if the determination of whether an action was brought for the purposes of 42 U.S.C.S. § 300aa-11(a)(6) is made with

reference to state law. See Walker v. Armco Steel Corp., 446 U.S. 740 (1980) (state law was controlling on determination of whether a federal court diversity action was timely filed). Okla. Stat. Ann. tit. 12, § 2003 (West Supp. 1991), provides that an action is commenced by the filing of a petition with the court. This is precisely the same language used in Fed. R. Civ. P. 3, which was interpreted in the Foster-Milburn Co. case. Indeed, the comments to the Oklahoma Pleading Code indicate its provisions, including § 2003, are adaptions of the Federal Rules of Civil Procedure, track the Federal Rules closely, and are intended to be interpreted in light of the case law construing the Federal Rules. Okla. Stat. Ann. tit. 12, ch. 39, Intro-

ductory Committee Comments (West Supp. 1991).

Thus, Oklahoma pleading practice and O.S.A. tit. 12, § 2003 should be interpreted in the same manner as federal law. As pointed out above, several federal cases have ruled that the filing of a complaint does not constitute "bringing and action," but that the issuance of summonses is also required. Foster-Milburn Co. v. Knight, supra. Therefore, assuming Oklahoma law is determinative on this question, it should be interpreted in accordance with federal law, which indicates that "bringing an action" requires service of a summons as well as filing of a complaint. Because no summonses were served by the Petitioners prior to their dismissal of their peti-

tion in state court, they did not "bring an action" for the purposes of 42 U.S.C.S. § 300aa-11(a)(6), and that section is inapplicable to the Petitioners.

Furthermore, nothing in the provisions of O.S.A. tit. 12, § 2003 indicate that "commencement" of an action is the same thing as "bringing" an action within the meaning of 42 U.S.C.S. § 300aa-11(a)(6). As the Committee Comments to § 2003 point out, use of the filing of the petition as the point at which an action is "commenced" was adopted in order to prevent uncertainty as to when the limitations period on the claim should stop running and to prevent defendants from escaping liability by avoiding service until well after the limitations period had run. Thus, the intent of § 2003 was

to fix a time certain for the purposes of determining whether an action was timely filed, which has nothing to do with whether an action was "brought" against a defendant as that term is used in the Vaccine Program. For a plaintiff to "bring" an action certainly requires more than just the act necessary to stop the limitations period from running.

That "bringing an action" under 42 U.S.C.S. § 300aa-11(a)(6) does not mean simply filing an action, but must also include service of the summons, is also consistent with the purposes behind the Vaccine Program. The legislative history indicates that the Program was intended to stem civil actions against vaccine manufacturers and administrators because such suits had made liability insurance

difficult to obtain, resulting in a lessening of the availability of vaccines. H.R. Rep. No. 908, 99th Cong., 2d Sess. 6-7, reprinted in 1986 U.S. Code Cong. & Admin. News 6344, 6345-46 (cited hereafter as "House Report"). Congress intended to give persons injured before the Program's effective date the option of either using the compensation system or the courts to obtain relief, but clearly wanted vaccine claims to be handled by the compensation system. House Report at 12-13, reprinted in 1986 U.S. Code Cong. & Admin. News at 6353-54. By interpreting 42 U.S.C.S. § 300aa-11(a)(6) as requiring that summonses be issued in order for an action to have been "brought" is consistent with these purposes, because until summonses are issued to defendants

they do not incur any expenses of litigation. Furthermore, making the time summonses issue the critical point allows injured persons to stop the running of any limitations period to consider whether to pursue a court action or enter the compensation system.

The judgment of the Claims Court was based not so much on the fact that the Petitioners had filed (and subsequently dismissed) a petition in state court on September 25, 1989, but on the fact that subsequent to the adverse decision of the Special Master the Petitioners had refiled their claim in state court against the State of Oklahoma and effected service upon the putative defendants in that action. The Claims Court ruled that because there was a complaint pending in

state court, it was effectively divested of jurisdiction to adjudicate the Petitioners' claim for compensation by virtue of 42 U.S.C.S. § 300aa-11(a)(6) (A-13).

The refiling of the state court action by the Petitioners must be considered in light of the unique circumstances of this case. After the Special Master issued his ruling that the Petitioners' petition should be dismissed, the Petitioners were faced with the prospect that no compensation would be available to them under the Vaccine Program. The putative defendants in the state court claim were state entities, and any claim against them had to comply strictly with the mandates of the Oklahoma Tort Claims Act. Thus, the Petitioners were faced with the prospect of

losing any remedy for their injuries if they did not act immediately to at least preserve their claim in the state court by refiling their claim there and having the putative defendants served with process. It is significant that the proceedings in state court have been completely stayed pending the outcome of the instant case.

Under these circumstances, it should not be concluded that the Petitioners are barred from recovering under the Vaccine Program because of precautionary measures taken to preserve at least one avenue of relief. The Petitioners found themselves in a "Catch-22" situation after the Special Master's decision, since recovery is this case was uncertain and delay in taking any action in the state forum would

result in the loss of their only other possibility for relief. The refiling was only a preventative step and the state court proceedings have gone only so far as to preserve any state relief the Petitioners may have available.

The refiling of the state claim must be considered in light of the purpose behind 42 U.S.C.S. § 300aa-11(a)(6). It was clearly intended to dissuade persons from filing common-law claims against vaccine manufacturers and administrators, thereby imposing high litigation costs on those parties, and to prevent persons from obtaining two chances at recovery. Throughout the course of these proceedings and even prior thereto, the Petitioners have acted consistent with these congressional objectives by almost im-

mediately dismissing their initial petition in state court and vigorously pursuing their remedy under the Vaccine Program. All along, the Petitioners have consistently asserted that they have no real desire to proceed in state court and certainly would prefer to avail themselves of the Vaccine Program remedy. The refiling of the state court action is not inconsistent with either the desire of the Petitioners to pursue a Vaccine Program petition or the congressional objectives outlined above, since the refiling was only for the purpose of preserving their last available remedy should 42 U.S.C.S. § 300aa-11(a)(6) be strictly applied against them.

Indeed, because the proceedings in state court have been completely stayed,

the congressional purpose behind 42 U.S.C.S. § 300aa-11(a)(6) would not be thwarted by allowing the Petitioners to proceed instead under the Vaccine Program. No costs of litigation have been imposed upon the putative defendants in the state case, which is the real purpose of the statutory bar. The refiling was merely a precautionary measure taken in response to the Special Master's decision, and the Petitioners' indications throughout these proceedings that the state claim would be eschewed should their petition under the Vaccine Program be allowed mandates that 42 U.S.C.S. § 300aa-11(a)(6) not be applied because of that refiling.

II. ANY OBJECTION TO THE PETITION FOR COMPENSATION BASED UPON THE PRIOR FILING OF THE STATE COURT ACTION WAS WAIVED BECAUSE THE RESPONDENT FAILED TO INCLUDE THAT DEFENSE IN THE ANSWER TO THE PETITION.

Assuming, arguendo, that the provisions of 42 U.S.C.S. § 300aa-11(a)(6) are found to be applicable, the petition could be dismissed sua sponte if that section is a jurisdictional requirement. However, a reading of the entire statutory scheme shows that 42 U.S.C.S. § 300aa-11(a)(6), if applicable, is not a jurisdictional bar to a claim for compensation under the Program.

Jurisdiction over Vaccine Program claims is set out in 42 U.S.C.S. § 300aa-12(a), which provides that the "United States Claims Court and the United States Claims Court special masters shall, in

accordance with this section, have jurisdiction over proceedings to determine if a petitioner under section 2111 [42 U.S.C.S. § 300aa-11] is entitled to compensation under the Program and the amount of such compensation." Nothing in the entirety of 42 U.S.C.S. § 300aa-12 indicates that the fact that a person injured before the Program's effective date filed a civil action after that date jurisdictionally bars the petition. Indeed, the provision at issue here, 42 U.S.C.S. § 300aa-11(a)(6), is contained in a completely separate section dealing with eligibility for compensation. Had it been intended that the merits of a claim are jurisdictional considerations, the eligibility requirements would have been included in 42 U.S.C.S. § 300aa-12. Thus,

42 U.S.C.S. § 300aa-11(a)(6) should not be read as a jurisdictional predicate to a compensation claim, but only as setting out a defense to such a claim. See Delta Coal Program v. Libman, 743 F.2d 852, 854 (11th Cir. 1984) (when the courts are called upon to determine what factors constitute essential elements to their jurisdiction under special congressional statutes, they should not infer requirements that would needlessly shut the courthouse door to the very kinds of controversies for which Congress particularly intended to afford a federal forum).

Because the provision at issue here is not jurisdictional, it must be deemed to have been waived by the Respondent since at no point was it raised as a defense to the claim. Under Vaccine Rule

4(b), "respondent shall file a report that shall set forth a full and complete statement of respondent's position as to why an award should or should not be granted" within 90 days of the filing of the petition. Respondent failed to do so in this case with respect to an objection under 42 U.S.C.S. § 300aa-11(a)(6). Additionally, RUSCC 12(g) provides for the waiver of defenses that are not made when available to the party opposing a claim. Therefore, any defense based upon the Petitioners' having filed a civil action after the effective date of the Program should be deemed waived and the petition should not be dismissed.

III. APPLICATION OF 42 U.S.C. § 300aa-11(a)(6) TO THE PETITIONERS WOULD VIOLATE THE EQUAL PROTECTION CLAUSE BECAUSE SIMILARLY SITUATED PERSONS WHO HAVE BEEN INJURED BY THE ADMINISTRATION OF VACCINES WOULD BE TREATED DIFFERENTLY WITHOUT ANY RATIONAL BASIS.

In dismissing the petition, the Special Master and the Claims Court relied upon 42 U.S.C.S. § 300aa-11(a)(6), which again provides that "[i]f a person brings a civil action after November 15, 1988 for damages for a vaccine-related injury or death associated with the administration of a vaccine before November 15, 1988, such person may not file a petition under subsection (b) for such injury or death." In the proceedings before the Special Master and the Claims Court, the Petitioners contended that application of this statute to them would violate the

constitutional guarantee to equal protection, but in each proceeding the argument was summarily rejected. The Petitioners contend that the conclusion below, that applying this provision to the Petitioners does not violate the constitutional guarantee to equal protection, is error and requires reversal.

The Vaccine Program provides compensation for persons injured both before and after its effective date. Thus, if an injured person or his or her legal representative brought a civil action before the Program's effective date and the action was either dismissed or no damages allowed, a petition for compensation can still be filed. 42 U.S.C.S. § 300aa-11(a)(4) and (5). However, 42 U.S.C.S. § 300aa-11(a)(6) prohibits those persons

who were injured by vaccines before November 15, 1988 from petitioning for compensation under the Program if they brought a civil action for damages after that date, whether or not the action was dismissed or fully prosecuted.

The Program thereby treats differently and makes distinctions within the group of persons injured by vaccinations administered before the effective date of the Program for the purpose of eligibility for compensation under the Program. This classification and treatment within the group of persons injured before the Program's effective date can be summarized as follows:

> (1) those persons who had previously brought civil action, no matter how long ago, and were denied damages are allowed to petition for compensation

> under the Program, 42 U.S.C.S. § 300aa-11(a)(4);
>
> (2) those persons who had civil actions pending on the effective date of the Program could dismiss their action and petition for compensation under the Program, 42 U.S.C.S. § 300aa-11(a)(5);
>
> (3) those persons who brought civil actions after November 15, 1988, whatever the extent to which the action is pursued, are prohibited from petitioning for compensation under the Program, 42 U.S.C.S. § 300aa-11(a)(6).

The Petitioners fall into this latter category (assuming they did "bring a civil action") because of the September 25, 1989 filing of the petition for damages in Oklahoma state court.

It is submitted that the classifications set up by the Program, if interpreted and applied to deny those such as the Petitioners access to compensation,

are irrational, arbitrary, and discriminatory, thereby violating the Petitioners' right to equal protection. The due process clause of the fifth amendment to the United States Constitution embraces an equal protection component prohibiting the federal government from unreasonably discriminating among persons similarly situated. United States v. Sperry Corp., 493 U.S. 52, 65 (1989); Washington v. Davis, 426 U.S. 229, 239 (1976). While the equal protection guarantee does not prohibit making distinctions between different persons, it does prohibit arbitrary and irrational discrimination among similarly situated persons. Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 83 (1988).

Equal protection applies with full force to governmental programs that distribute benefits, such as the Vaccine Program. In Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1985), this Court held that when a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the equal protection guarantee. The distribution of benefits under a federal program and the distinctions drawn by the legislation are similarly required to be rational and bear a reasonable relationship to a governmental purpose. See Lyng v. International Union, United Auto Workers & Agricultural Implement Workers of America, 485 U.S. 360, 370 (1988) (classifications drawn by federal food stamp program must meet test of rationality).

Under this rationality standard, those injured by vaccines prior to the effective date of the Program constitute the relevant group for the purpose of equal protection analysis because these persons are similarly situated. As between persons who had civil actions pending at the time the Program was in effect and those such as the instant Petitioners who filed a civil action after its effective date, only members of the former group are given the opportunity to dismiss their actions and enter the compensation system. This distinction makes little sense in light of the stated congressional purpose to encourage injured persons to enter the Program and dissuade them from "bringing civil actions" against vaccine manufacturers and admin-

istrators. House Report at 12-13, reprinted in 1986 U.S. Code Cong. & Admin. News at 6353-54. In light of this purpose, it is irrational to allow those who had actions pending at the time the program became effective, having already imposed litigation costs on vaccine manufacturers and administrators, to dismiss their actions and enter the compensation Program and yet deny those persons, like the Petitioners, who merely filed an action after November 15, 1988 but did not pursue it, thereby preventing the litigation costs.

Similarly, persons under 42 U.S.C.S. § 300aa-11(a)(4) have already imposed the litigation costs and burdens upon vaccine manufacturers and administrators that the Program was meant to avoid, so allowing

them into the compensation system cannot serve the congressional purpose of dissuading civil actions. Moreover, these persons have already had their opportunity to obtain damages under traditional tort concepts and were denied compensation. They are allowed the opportunity to obtain Program compensation while those in the Petitioners' situation, who have not yet attempted to obtain tort damages and have followed Congress's wishes in eschewing their civil remedies, are not given the chance to enter the Program. This classification scheme is wholly unreasonable and arbitrarily discriminates against persons like the Petitioners.

The legislative history of the Program offers no support for the reason-

ableness of the classifications outlined above. The major purpose behind the Program was to alleviate the burdens and uncertainties of traditional civil tort actions placed upon those injured by vaccines, and to free manufacturers and administrators of vaccines from the similar burden of defending such suits. House Report at 6, reprinted in 1986 U.S. Code Cong. & Admin. News at 6347. Congress found that manufacturers and administrators of vaccines had become concerned with not only the expenses of litigation and liability, but also with the limited availability of liability insurance, resulting in a dearth of available sources in the marketplace and the danger that vaccines would not be available.

House Report at 6-7, reprinted in 1986 U.S. Code Cong. & Admin. News at 6345-46.

Under the Program, Congress established different groups of petitioners depending upon when the vaccine injury was incurred. Of relevance here is the second group of Petitioners, those injured before its effective date. The legislative history describes Congress's intent with respect to those falling under 42 U.S.C.S. § 300aa-11(a)(4) as follows:

> If such person has pursued a civil action against a manufacturer before enactment of the legislation and no damages were awarded or the action was dismissed, he or she may file for compensation. . . . It is not intended that such a claimant would be permitted to file a new civil action upon completion of the compensation proceedings; rather, this permissive entry is provided only to give these persons the oppor-

> tunity for compensation under the no-fault system.

House Report at 13-14, reprinted in 1986 U.S. Code Cong. & Admin. News at 6354-55.

With respect to those falling under 42 U.S.C.S. § 300aa-11(a)(5), Congress stated:

> If a person in the second group has a tort action against a manufacturer pending at the time of enactment, he or she may elect to maintain such an action or may, within two years of enactment or before judgment in the action (whichever comes first), elect to withdraw the action without prejudice and enter the compensation system. If such a person elects to maintain the civil action, he or she is permanently barred from entering the compensation system. If such a person elects to withdraw the civil action within the specified time, he or she may enter the system and may, at the conclusion of the compensation proceedings, elect to pursue whatever tort remedies may be available[.]

House Report at 14, reprinted in 1986 U.S. Code Cong. & Admin. News at 6355.

Nothing in the legislative history indicates why persons such as the Petitioners are barred by the mere filing of a civil action and not given the same choice as others injured before the Program's effective date to enter the compensation program in lieu of the civil action. The entirety of the Program's legislative history indicates that persons injured before its effective date are to be given at least one opportunity to compensation under the no-fault system, but the provisions of 42 U.S.C.S. § 300aa-11(a)(6) as applied by the Special Master and Claims Court in this case, are at odds with that purpose.

In light of this legislative history, it cannot be said that an interpretation and application of 42 U.S.C.S. § 300aa-11(a)(6), as applied below, to bar persons in the Petitioners' situation from entering the compensation system, rationally furthers a legitimate governmental interest. Bankers Life & Casualty Co. v. Crenshaw, supra, 486 U.S. at 83. While it may be conceded that it was rational for Congress to preclude those who actively pursue common-law remedies from entering the Program in order to dissuade them from burdening manufacturers and administrators with litigation costs, that purpose is not furthered by 42 U.S.C.S. § 300aa-11(a)(6), since those who file civil actions do not necessarily impose such litigation costs, especially

when the action is immediately dismissed. On the other hand, those falling under 42 U.S.C.S. § 300aa-11(a)(4) and (5) have necessarily imposed the burdens upon manufacturers and administrators that the Program was meant to avoid.

It will not do to argue that all persons injured by vaccines are treated equally because each is given one opportunity to enter the Vaccine Program compensation system. As this case demonstrates, all such persons are not treated similarly under the application of 42 U.S.C.S. § 300aa-11(a)(6) made below. Both the Special Master and the Claims Court determined that the Petitioners should not be afforded that one opportunity to Vaccine Program compensation. Simply because all injured persons are

given the opportunity to sue for damages does not mean that equal protection is not violated when the rights of some persons to maintain an action are made conditional. Thus, in Pickett v. Brown, 462 U.S. 1, 12 (1983), this Court ruled that a statute setting a limitations period on actions brought by illegitimate children violated the equal protection clause where a similar limitation was not imposed upon legitimate children. Equal protection principles are implicated whenever the government adopts a rule that has a special impact on less than all the persons subject to its jurisdiction. New York Transit Authority v. Beazer, 440 U.S. 568, 587-88 (1979). The application of 42 U.S.C.S. § 300aa-11(a)(6) as made in the Claims Court certain-

ly treats the Petitioners differently from other similarly situated persons injured by vaccines by imposing a limit on the ability to obtain compensation not imposed on these other persons.

While it might be rational for Congress to have excluded persons who have filed actions for vaccine injuries from the Vaccine Program in light of the goal to limit actions against manufacturers and administrators, Congress did not exclude all persons who commenced civil actions from entering the compensation system. Instead, 42 U.S.C.S. § 300aa-11(a)(6), as applied in the Claims Court, singles out persons like the Petitioners, who merely took steps to preserve any common-law actions, to be barred from the compensation system while allowing others

who already maintained actions against vaccine manufacturers or administrators to enter the compensation system. Thus, the question becomes whether it was rational to exclude persons like the Petitioners and at the same time allow the benefits of the compensation system to others who had previously commenced and completed common-law actions for vaccine-related injuries. Clearly, it is wholly arbitrary and irrational to exclude persons like the Petitioners and at the same time allow others who have already imposed the costs and burdens of litigation upon vaccine manufacturers and administrators to enter the compensation system.

A strict application of 42 U.S.C.S. § 300aa-11(a)(6) is at odds with the stated legislative purpose of "divert-[ing] a significant number of potential plaintiffs from litigation." House Report at 13, reprinted in 1986 U.S. Code Cong. & Admin. News at 6354. While Congress intended to allow persons injured before the effective date of the Program to pursue civil remedies, it makes no sense to exclude from the Program those who merely have filed such an action and then chosen to enter the Program while at the same time allowing the benefits of the no-fault system to those who dismissed actions pending on the effective date. Because no rational basis exists for the classification set up by 42 U.S.C.S. § 300aa-11(a)(4)-(6) for the

distribution of benefits, it violates equal protection and should not be enforced against the Petitioners. Hooper v. Bernalillo County Assessor, supra.

IV. UNDER THE CIRCUMSTANCES OF THIS CASE, IT WOULD BE A VIOLATION OF DUE PROCESS TO ALLOW DISMISSAL OF THE PETITIONERS' PETITION FOR COMPENSATION.

To bar the Petitioners' claim for compensation also would be fundamentally unfair under the facts of this case. As noted above, Cassaundra Vire died December 29, 1987, and Sherrie Vire was not appointed administrator of Cassaundra's estate until December 27, 1988. Because the Petitioners' claim was against a State of Oklahoma entity, they were required to file a notice of claim for damages with the state almost immediately

after Sherrie's appointment since O.S.A. tit. 51, § 156(F) (West 1988) requires presentation to the state of a claim for wrongful death within one year of the death. Notice of the denial of the claim was not received until April 7, 1989, and from that point the Petitioners had only 180 days to file an action in Oklahoma court. O.S.A. tit. 51, § 157(B) (West 1988). The Petitioners therefore had to make a quick choice of whether to pursue the state court action or enter the Program's compensation system.

Considering the short time frame involved under Oklahoma's Governmental Tort Claims Act, it would be manifestly unfair to penalize the Petitioners because they were forced to file a court action and to find that they are barred from compensa-

tion under 42 U.S.C.S. § 300aa-11(a)(6). As a waiver of the state's immunity, Oklahoma courts have narrowly construed the waiver and held that the notice of claim and time for filing provisions are jurisdictional prerequisites. Gurley v. Memorial Hospital of Guymon, 770 P.2d 573, 576 (Okla. 1989); see also Trent v. Board of County Commissioners of Johnston County, 755 P.2d 615, 619 (Okla. 1988) (rejecting plaintiff's argument that substantial compliance with filing requirements was sufficient under Tort Claims Act). Thus, to preserve their claim against the state, the Petitioners were required to act quickly and specifically in accordance with Oklahoma law.

Even though the Vaccine Act contains a tolling provision applicable to state

actions, it is not and was not clear to the Petitioners that, by filing a compensation claim, the time for filing a claim against the state would be tolled. The provision for tolling only states that if a petition for compensation is filed under the Program, "limitations of actions under State law shall be stayed with respect to a civil action brought for such injury[.]" 42 U.S.C.S. § 300aa-16(c). Nothing in this section or the case law indicates whether this tolling applies only to private parties or also includes actions against a state itself. In light of the ambiguity of this section and the clear Oklahoma law that mandates strict compliance with the Governmental Tort Claims Act, the Petitioners were forced at least to preserve their claim

against the state by filing a petition in state court.

The circumstances here show that the Petitioners were placed in an unfair situation of either foregoing their federal claim for compensation by filing a state court action or risk losing their right to recover against the State of Oklahoma by not strictly complying with state filing deadlines. The essence of due process is fundamental fairness. United States ex rel. Crist v. Lane, 745 F.2d 476, 482 (7th Cir. 1984), cert. denied, 471 U.S. 1068 (1985). At a very minimum, due process requires that an aggrieved party be given an opportunity to present his case and have its merits judged fairly. Pollock v. Baxter Manor Nursing

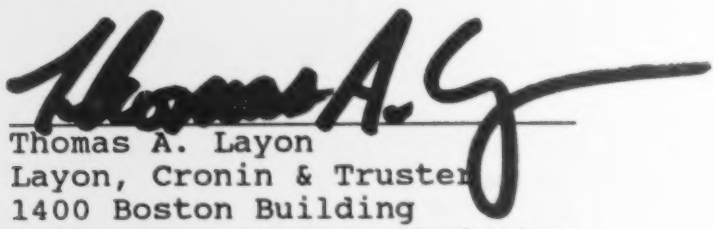
Home, 716 F.2d 545, 546-47 (8th Cir. 1983).

The interplay between the Oklahoma Governmental Tort Claims Act filing requirements and 42 U.S.C.S. § 300aa-11(a)(6), if interpreted to bar the Petitioners' claim, denies the Petitioners a fair opportunity to obtain compensation under the Program, and fundamental fairness demands that a strict application of 42 U.S.C.S. § 300aa-11(a)(6) not be enforced under the special circumstances of the instant case.

CONCLUSION

For the reasons set out above, the Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Federal Circuit upholding the dismissal of the Petitioners' petition for compensation under the Vaccine Program.

Respectfully Submitted,



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Attorney of Record

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1991

SHERRIE VIRE, Individually and as Mother and Personal Representative of the Estate of Cassaundra Radeen Vire, deceased, and KEVIN VIRE, Individually and as Father of Cassaundra Radeen Vire, deceased,

Petitioners,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPENDIX

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IN THE UNITED STATES CLAIMS COURT

OFFICE OF THE SPECIAL MASTERS
(Filed: December 28, 1990)

SHERRIE VIRE, Individually as Mother and Personal representative of the Estate of CASSAUNDRA RADEEN VIRE, deceased, and KEVIN VIRE, Individually and as Father,	
Petitioners,	No. 90-84V
v.	
SECRETARY OF THE DEPT. OF HEALTH AND HUMAN SERVICES,	
Respondent.	

Thomas A. Layon, Tulsa, Oklahoma for petitioners.

Michael P. Milmoe, U. S. Department of Justice, Washington, D.C., for respondent.

ORDER OF DISMISSAL

BAIRD, Special Master

On January 25, 1990, Sherrie Vire, as legal representative of the estate of Cassaundra R. Vire (hereinafter "Cassaundra"), deceased, filed a petition for compensation under the National Vaccine Injury Compensation Program[1] [hereinafter the Program or the Act] for Cassaundra's death on December 29, 1987, which allegedly resulted from a DPT (diphtheria, pertussis, and tetanus) inoculation on December 28, 1987.[2,3] Respondent ap-

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[1]The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, as amended, 42 U.S.C.A. §§ 300aa-1 et seq. (West Supp. 1990). The Act was recently amended by the Vaccine and Immunization Amendments of 1990, Pub. L. No. 101-502 (1990). For convenience, individual sections of the Act will be cited herein without reference to 42 U.S.C.A. § 300aa.

[2]Sherrie Vire and Kevin Vire, parents of Cassaundra, also petitioned individually, but the Act does not provide

peared and filed a report denying petitioner's entitlement on the merits to compensation under the Program.

In preparing for a status conference on September 25, 1990, the undersigned noticed that the order dismissing a prior civil action against the State of Oklahoma had a 1989 prefix.[4] In response to the court's inquiry at the status conference concerning the date of filing of the said civil action, petitioners' counsel informed the court that the action was filed on September 25, 1989. The court

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for compensation for the parents of an injured or deceased vaccine recipient in their individual capacities.

[3]The petition, which was initially assigned to Special Master David Gerard, was reassigned to the undersigned on June 5, 1990.

[4]Petition exhibit I.

advised counsel that, in light of the date of the filing of the civil action, the present proceeding appeared to be barred by 42 U.S.C. § 300aa-11(a)(6), which bars filing under the Vaccine Injury Compensation Program where a civil action was filed after November 15, 1988, seeking compensation for injury or death associated with the administration of a vaccine prior to November 15, 1988. The court ordered petitioners to show cause why the instant proceeding should not be dismissed pursuant to the aforesaid statutory provision.

The issue has been briefed by both parties. Petitioners have presented several arguments against dismissal, all of which, upon review, have been found to be without merit. With respect to the pur-

ported distinction in the law between "filing" or "commencing" an action and "bringing" an action, the transfer act cases cited by petitioners are not helpful to them. In the first place, the issue in the transfer act cases is whether the defendant could have been served in the jurisdiction to which transfer is sought, not whether the defendant was served. There is no question here that the plaintiff in the Oklahoma civil action could have effected service against the State of Oklahoma in that proceeding. Further, the generally accepted rule is that "commence an action" and "bring an action" mean the same thing when used in a context other than a transfer act proceeding. See Goldenberg v. Murphy, 108

U.S. 162 (1883); see also Black's Law Dictionary 174 (5th ed. 1979).

By filing a civil action seeking compensation for Cassaundra's death after November 15, 1988, Sherrie Vire made an election of remedies which precludes her from pursuing the instant claim. Kevin Vire, who has petitioned individually, is not entitled to any compensation under the Program.

In the absence of a motion for review filed in accordance to RUSCC Appendix J, the clerk of the court is directed to enter judgment dismissing the petition in the above-entitled matter with prejudice.

/s/
Paul T. Baird
Special Master

IN THE UNITED STATES CLAIMS COURT

SHERRIE VIRE, Individually and as Mother and Personal Representative of the Estate of Cassaundra Radeen Vire, deceased, and KEVIN VIRE, Individually and as Father of Cassaundra Radeen Vire, deceased,		
Petitioners,	*	No. 90-84V
	*	Filed:
	*	May 13, 1991
v.		
THE UNITED STATES		
Respondent.		

ORDER

This matter is before the court on appeal from the Special Master's decision dismissing petitioners' petition for lack of jurisdiction. After considering the parties' briefs, and their respective arguments during the May 10, 1991 oral ar-

gument, the court finds that it does not have jurisdiction over petitioners' claim and must affirm the Special Master's December 28, 1990, order of dismissal.

During a September 25, 1990 status conference, the Special Master sua sponte raised the issue of whether plaintiffs' claim was barred by 42 U.S.C. § 300aa-11(a)(6). That statute provides: "[i]f a person brings a civil action after November 15, 1988 for damages for a vaccine-related injury or death associated with the administration of a vaccine before November 15, 1988, such person may not file a petition . . . for such injury or death." (Emphasis added.) 42 U.S.C. § 300aa-11(a)(6). On September 25, 1989, plaintiff Sherrie Vire had commenced an action against the State of Oklahoma,

under the Oklahoma Tort Claims Act, for Cassaundra Vire's cause of action allegedly stemming from a DPT (diphtheria, pertussis, and tetanus) inoculation administered by the Rogers County, Oklahoma, Health Department, the same cause of action which is the subject of this proceeding. Sherrie Vire subsequently obtained dismissal of her complaint without prejudice prior to serving any summons upon the named defendant in that proceeding.

The Special Master held that notwithstanding the dismissal of her complaint without prejudice petitioners, by the mere filing of the prior action, made an election of remedies which precluded jurisdiction in this court. Accordingly,

the Special Master entered judgment dismissing petitioners' petition.

Subsequently, petitioners timely filed their objection to the Special Master's judgment and moved pursuant to RUSCC, Appendix J, for a review of the Special Master's decision dismissing their claim. In their motion, petitioners allege that (1) the interpretation and application of 42 U.S.C. § 300aa-11 (a)(6) to bar petitioners' claim violates the equal protection clause; (2) the provisions of § 300aa-11(a)(6) are inapplicable because petitioners did not bring a civil action within the meaning of that section; (3) the petition should not be dismissed because only one of the parties to the petition was involved in the prior civil action; (4) any objection to peti-

tioners' claim is not jurisdictional and the failure of respondent to make any objection to the petition under § 300aa-11(a)(6) was waived; and, (5) application of § 300aa-11(a)(6) would violate due process because petitioners were forced to comply with Oklahoma tort claims procedures and was not given a choice of forums for their claim.

During oral argument, petitioners' counsel did not address most of these arguments. His principal contention was that since the summons in the state court action was never served and that action was later dismissed without prejudice, the filing was a nullity. Thus, no action was ever commenced or brought within the meaning of 42 U.S.C. § 300aa-11(a)(6). However, also during oral argument,

petitioners' counsel, upon inquiry by the court, advised that he had refiled Sherrie Vire's action against the State of Oklahoma and had effected valid service of process upon the defendant in that proceeding. He admitted that he had not advised defendant's counsel of his refiling of the earlier suit prior to oral argument. However, he explained that this recent refiling was taken as a precautionary matter to preserve that cause of action in the event that the Special Master's decision was ultimately affirmed. Thus, at this time it is undisputed that there is pending in an Oklahoma State court a complaint which seeks a recovery for the death of petitioner, caused by the same DPT inoculation which is the subject of this proceeding, which

action, by agreement of the parties, has been stayed. In these circumstances the court is convinced that under 42 U.S.C. § 300aa-11(a)(6), the refiling of the prior suit under the Oklahoma Tort Claims Act, which suit is still pending, has effectively divested this court of any jurisdiction it may have had to adjudicate petitioners' claim. Further, the court has considered petitioners' other arguments submitted on brief and for the reasons assigned by respondent finds them without merit.

Consequently, the court finds that all of petitioners' objections to the decision of the Special Master are without merit. The decision of the Special Master is affirmed.

/s/

WILKES C. ROBINSON, Judge

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

JAN 13, 1992

FRANCIS X. GINDHART
Clerk

Note: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-5124

SHERRIE VIRE, Individually and as Mother and Personal Representative of the Estate of Cassaundra Radeen Vire, deceased, and KEVIN VIRE, Individually and as Father of Cassaundra Radeen Vire, deceased,

Petitioners-Appellants,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.

JUDGMENT

ON APPEAL
from the UNITED STATES CLAIMS COURT

in CASE NO(S). 90-84V

This CAUSE having been considered, it is

ORDERED and ADJUDGED:

Per Curiam: (MAYER, CLEVENGER, and RADER, Circuit Judges:

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

/s/
Francis X. Gindhart, Clerk

DATED: Jan. 13, 1992

Section 311(a) of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3758 (1986), as amended and codified at 42 U.S.C.S. § 300aa-11 (Law. Co-op. 1991)

(a) General rule. (1) A proceeding for compensation under the Program for a vaccine-related injury or death shall be initiated by service upon the Secretary and the filing of a petition containing the matter prescribed by subsection (c) with the United States Claims Court. The clerk of the United States Claims Court shall immediately forward the filed petition to the chief special master for assignment to a special master under section 2112(d)(1).

(2)(A) No person may bring a civil action for damages in an amount greater than $1,000 or

in an unspecified amount against a vaccine administrator or manufacturer in a State or Federal court for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after the effective date of this part, and no such court may award damages in an amount greater than $1,000 in a civil action for damages for such a vaccine-related injury or death, unless a petition has been filed, in accordance with section 2116, for compensation under the Program for such injury or death and--

(i)(I) the United States Claims Court has issued a judgment under section 2112 on such petition, and

(II) such person elects under section 2121(a) to file such an action, or

(ii) such person elects to withdraw such petition under section 2121(b) or such petition is considered withdrawn under such section.

(B) If a civil action which is barred under subparagraph (A) is filed in a State or Federal court, the court shall dismiss the action. If a petition is filed under this section with

respect to the injury or death for which such civil action was brought, the date such dismissed action was filed shall, for purposes of the limitations of actions prescribed by section 2116, be considered the date the petition was filed if the petition was filed within one year of the date of the dismissal of the civil action. (3) No vaccine administrator or manufacturer may be made a party to a civil action (other than a civil action which may be brought under paragraph (2)) for damages for a vaccine-related injury or death associated with the administra-

tion of a vaccine after the effective date of this part.

(4) If in a civil action brought against a vaccine administrator or manufacturer before the effective date of this part damages were denied for a vaccine-related injury or death or if such civil action was dismissed with prejudice, the person who brought such action may file a petition under subsection (b) for such injury or death.

(5)(A) A plaintiff who on the effective date of this part has pending a civil action for damages for a vaccine-related injury or death may, at any time

within 2 years after the effective date of this part or before judgment, whichever occurs first, petition to have such action dismissed without prejudice or costs and file a petition under subsection (b) for such injury or death.

(B) If a plaintiff has pending a civil action for damages for a vaccine-related injury or death, such person may not file a petition under subsection (b) for such injury or death.

(6) If a person brings a civil action after November 15, 1988 for damages for a vaccine-related injury or death associated with the administration

of a vaccine before November 15, 1988, such person may not file a petition under subsection (b) for such injury or death.

(7) If in a civil action brought against a vaccine administrator or manufacturer for a vaccine-related injury or death damages are awarded under a judgment of a court or a settlement of such action, the person who brought such action may not file a petition under subsection (b) for such injury or death.

(8) If on the effective date of this part there was pending an appeal or rehearing with re-

spect to a civil action brought against a vaccine administrator or manufacturer and if the outcome of the last appellate review of such action or the last rehearing of such action is the denial of damages for a vaccine-related injury or death, the person who brought such action may file a petition under subsection (b) for such injury or death.

(9) This subsection applies only to a person who has sustained a vaccine-related injury or death and who is qualified to file a petition for compensation under the Program.

(b) Petitioners. (1)(A) Except as provided in subparagraph (B), any person who has sustained a vaccine-related injury, the legal representative of such person if such person is a minor or is disabled, or the legal representative of any person who died as the result of the administration of a vaccine set forth in the Vaccine Injury Table may, if the person meets the requirements of subsection (c)(1), file a petition for compensation under the Program.

(B) No person may file a petition for a vaccine-related injury or death associated with a

vaccine administered before the effective date of this part if compensation has been paid under this subtitle for 3500 petitions for such injuries or deaths.

(2) Only one petition may be filed with respect to each administration of a vaccine.

(2)

No. 91-1644

Supreme Court, U.S.
FILED
JUN 10 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

SHERRIE VIRE, ETC., ET AL., PETITIONERS

v.

SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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STUART M. GERSON
Assistant Attorney General

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QUESTION PRESENTED

Whether, in view of petitioners' pending state court action involving the same vaccine-related injury, the Claims Court should have dismissed petitioners' petition for compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. 300aa-1 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1644

SHERRIE VIRE, ETC., ET AL., PETITIONERS

v.

SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals (Pet. App. A15-A26), the Claims Court (Pet. App. A7-A14), and the special master (Pet. App. A1-A6) are unreported. The judgment of the court of appeals is noted at 945 F.2d 733 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1992. The petition for a writ of certiorari was filed on April 13, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Childhood Vaccine Injury Act of 1986 (hereinafter the Vaccine Act or Act), 42 U.S.C. 300aa-1 *et seq.*, establishes a National Vaccine Injury Compensation Program (the Program), administered by the Secretary of Health and Human Services (HHS), to provide compensation to persons who suffer certain vaccine-related injuries. Section 300aa-10(a). The Act requires persons suffering injuries from a covered vaccine that was administered after its enactment to seek compensation through the Program before suing a vaccine manufacturer or administrator. Section 300aa-11(a)(2)(A).

The Act also permits persons whose vaccine-related injuries predate the legislation's enactment to petition for compensation under the Program in certain instances. Persons who had previously been denied compensation in a civil action against a vaccine administrator or manufacturer that was concluded before the effective date of the compensation Program may petition for compensation under the Program. 42 U.S.C. 300aa-11(a)(4). Also, within certain time limits, persons who had civil actions pending on the effective date of the Program could dismiss their actions and file a petition for compensation under the Program. Section 300aa-11(a)(5). However, participation in the Program is not available to any person who "brings a civil action after November 15, 1988 for damages for a vaccine-related

injury or death associated with the administration of a vaccine before November 15, 1988." Section 300aa-11(a)(6).[1]

A person initiates a proceeding for compensation by filing a petition with the United States Claims Court, and serving it on the Secretary. Section 300aa-11(a)(1). A special master conducts an informal proceeding to determine whether compensation is warranted and the amount of such compensation. Section 300aa-12(d)(1) and (3). The special master's decision is reviewable by the Claims Court. Section 300aa-12(e). The Court of Appeals for the Federal Circuit has jurisdiction to review the findings of fact and conclusions of law of the Claims Court if an appeal is filed within 60 days of judgment. Section 300aa-12(f).

2. Petitioners are the surviving parents of Cassaundra Vire who, on December 28, 1987, at approximately six months of age, received her third diphtheria-pertussis-tetanus (DPT) inoculation at a county health department clinic in Oklahoma. The following day, December 29, 1987, Cassaundra was found dead in her crib. Pet. App. A2.

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[1] Section 300aa-11(a)(6) as originally enacted prohibited anyone who brought a civil action after the effective date of the Vaccine Act (October 1, 1988) from obtaining an award of compensation under the Program. After learning that the Claims Court did not begin accepting petitions for compensation until November 15, 1988, Congress amended Section 300aa-11(a)(6) to make that the operative date of the provision, on the theory that persons filing civil actions before the Claims Court began accepting petitions under the Program "did not * * * have a true choice" between entering the statutory compensation Program and seeking recovery through the courts. H.R. Rep. No. 247, 101st Cong., 1st Sess. 509, 511 (1989).

On December 27, 1988, petitioner Sherrie Vire, as personal representative of her daughter's estate, presented to the State of Oklahoma an administrative claim for damages arising out of Cassaundra's death pursuant to the Oklahoma Governmental Tort Claims Act (Tort Claims Act), Okla. Stat. Ann. tit. 51, § 151 *et seq.* (West 1988). In September 1989, after the State denied the claim, Mrs. Vire filed a petition for damages in state court under the Tort Claims Act against the State of Oklahoma and the Oklahoma Department of Health. According to petitioners (Pet. 4), no summonses were ever issued or served on the defendants in that action. On December 19, 1989, Mrs. Vire dismissed the tort action against the state defendants without prejudice. *Ibid.*

3. Petitioners then initiated proceedings under the Vaccine Act on January 25, 1990. Pet. App. A2. The Secretary filed a report denying that petitioners were entitled to compensation. At a status conference on September 25, 1990, the special master *sua sponte* noted a possible defect in the Claims Court's jurisdiction in view of petitioners' admission that a prior civil action had been filed in September 1989 against the State of Oklahoma involving the same alleged vaccine-related injuries. *Id.* at A3-A4.

Following briefing by both sides, the special master issued an order of dismissal on December 28, 1990. Pet. App. A1. The special master rejected petitioners' argument that, since the defendants in the prior state court action were never served with process, Mrs. Vire did not actually "bring" a civil action within the meaning of Section 300aa-11(a)(6). The Master explained that "the generally accepted rule is that 'commence an action' and 'bring an action' mean the same thing." Pet. App. A5. The special master con-

cluded that "[b]y filing a civil action seeking compensation for Cassaundra's death after November 15, 1988, Sherrie Vire made an election of remedies which precludes her from pursuing the instant claim." *Id.* at A6.

4. Petitioners filed a motion for review of the special master's order in the Claims Court. During oral argument in the Claims Court, petitioners' counsel revealed that, following the special master's decision, he had refiled Sherrie Vire's action against the State of Oklahoma and had effected valid service of process against the defendants. Pet. App. A12. In light of those developments, the Claims Court held that "under 42 U.S.C. § 300aa-11(a)(6), the refiling of the prior suit under the Oklahoma Tort Claims Act, which suit is still pending, has effectively divested this court of any jurisdiction it may have had to adjudicate petitioner's claim." *Id.* at A13. The court also considered petitioners' other arguments, see *id.* at A10-A11,[2] "and for the reasons assigned by [the Secretary,] f[ound] them without merit." *Id.* at A13. Accordingly, the decision of the special master was affirmed by the court. *Id.* at A14.

5. The court of appeals affirmed in an unpublished per curiam judgment pursuant to the local rules of the court. See Fed. Cir. R. 36.

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[2] Petitioners had argued, *inter alia*, that dismissal of their petition for compensation under 42 U.S.C. 300aa-11(a)(6) (1988 & Supp. I 1989) deprived them of the right to due process and the equal protection of the laws; that they had not "brought" a civil action within the meaning of the Section; and that any objection based on that Section was not jurisdictional and was therefore waived by the Secretary's failure to raise it in the answer to the petition for compensation.

ARGUMENT

The court of appeals' summary affirmance of the Claims Court's decision, which lacks precedential effect within the only circuit having jurisdiction over Vaccine Act claims, is correct and does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. Section 300aa-11(a)(6) of the Vaccine Act bars from participation in the compensation Program any "person [who] brings a civil action *after November 15, 1988* for damages for a vaccine-related injury or death associated with the administration of a vaccine *before November 15, 1988*." 42 U.S.C. 300aa-11 (a)(6) (Supp. I 1989) (emphasis added). Cassaundra Vire received her third DPT inoculation on December 28, 1987, and died the next day. Petitioners admit that they filed suit seeking compensation against the vaccine administrator on September 25, 1989—long after the Program became effective. Pet. 4. Moreover, they concede that their action against the vaccine administrator—involving the same inoculation that is the subject of the instant proceedings—has been refiled and is now pending in a state court. Pet. 6. Under these circumstances, petitioners are barred by the clear terms of Section 300aa-11(a)(6) from seeking compensation under the Program. Thus, the court of appeals was correct to affirm the Claims Court's holding that the actions filed by petitioners in state court divested it of "any jurisdiction it may have had to adjudicate petitioners' claim" under the compensation Program. Pet. App. A13.[3]

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[3] Petitioners also argue (Pet. 9-15) that the special master erred in concluding that they had made an "election of remedies" by initiating a civil action in state court in 1989. Petitioners rely exclusively on cases concerning the common law

2. Petitioners renew their contention, raised in the courts below, that the compensation petition at issue is not barred because Mrs. Vire did not "bring a civil action" within the meaning of Section 300aa-11(a)(6). Petitioners observe that, although the September 1989 action was filed in state court, summonses were never served on the defendants.

Contrary to petitioners' assertion, petitioners succeeded in "bring[ing] an action" in Oklahoma state court in September 1989. This phrase has a settled meaning at law, and refers to the initiation of legal proceedings by filing a complaint. See *Black's Law Dictionary* 174 (5th ed. 1979); see also, *e.g.*, *Blumenthal* v. *G-K-G, Inc.*, 737 F. Supp. 493, 494 (N.D. Ill. 1990) (to "bring an action" refers to the initiation of legal proceedings by the filing of a complaint); *American Casualty Co.* v. *FSLIC*, 683 F. Supp. 1183, 1185 (S.D. Ohio 1988) (same). Cf. Fed. R. Civ. P. 3 (providing that "[a] civil action is commenced by filing a complaint with the court.")[4] Nothing in the

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doctrine of election of remedies, which are inapplicable here. The Vaccine Act governs the relief available to petitioners, and the question whether petitioners' compensation claim is barred is strictly a matter of statutory construction. See *Johns-Manville Corp.* v. *United States*, 855 F.2d 1556 (Fed. Cir. 1988), cert. denied, 489 U.S. 1066 (1989).

[4] Petitioners rely (Pet. 16-18) on cases interpreting 28 U.S.C. 1404(a), which provides that "a district court may transfer any civil action to any other district or division where it might have been brought." See *Foster-Milburn Co.* v. *Knight*, 181 F.2d 949 (2d Cir. 1950); *Schacht* v. *Javits*, 53 F.R.D. 321 (S.D. N.Y. 1971); *Twentieth Century-Fox Film Corp.* v. *Taylor*, 239 F. Supp. 913 (S.D. N.Y. 1965). The courts in those cases held that a district in which the defendant is not amenable to process is not one in which an action "might have been brought" under Section 1404(a). Those

language of Section 300aa-11(a)(6) justifies deviating from the customary meaning by adding the requirement that a summons be served on the defendant. In any event, petitioners concede that the state defendants were properly served when petitioners refiled their lawsuit against the vaccine administrator following the special master's dismissal of their compensation claim. Thus, even if petitioners' reading of Section 300aa-11(a)(6) were correct, their petition for compensation should still have been dismissed under that Section.[5]

3. Petitioners also claim (Pet. 30-33) that, since the Secretary failed to argue in the answer to the petition for compensation that the petition was barred under Section 300aa-11(a)(6), that objection was waived under Fed. R. Civ. P. 12(h). This is so, petitioners contend, because Section 300aa-11(a)(6) is not a jurisdictional requirement. Petitioners rely on the observation (Pet. 31) that the statute grants the Claims Court jurisdiction over the compensation pro-

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courts did not decide—nor does it follow from their decisions—that a plaintiff has "brought an action" within the meaning of the Vaccine Act only if the defendant is actually served.

[5] Petitioners contend (Pet. 25-29) that Section 300aa-11(a)(6) should not be applied to bar their compensation claim because they refiled their civil action against the State of Oklahoma to prevent the running of the state statute of limitations—and the possible loss of any claim for relief—while the decision to dismiss their Vaccine Act claim was on appeal. Because Section 300aa-11(a)(6) is jurisdictional, see pages 8-9, *infra*, the reason for their refiling is irrelevant. In any event, petitioners' filing was unnecessary: Under Section 300aa-16(c) of the Vaccine Act, the state statute of limitations is tolled by the filing of a claim for compensation under the Program. See also *Greider* v. *Secretary of HHS*, 23 Cl. Ct. 348, 351 & n.5 (1991).

gram in a separate Section (see 42 U.S.C. 300aa-12(a) (1988 & Supp. I 1989)): therefore, they argue, Section 300aa-11(a)(6) must have nothing to do with jurisdiction.

Petitioners are wrong. This Court has stated that "[w]hen the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction." *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986). See also *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued, * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."). The Vaccine Act waives the sovereign immunity of the United States by permitting suits for compensation for vaccine-related injury under circumstances defined in the Act. Section 300aa-11(a)(6) operates as a limitation on the waiver of sovereign immunity by denying the government's consent to be sued when a civil action has been filed after November 15, 1988, based on a claim arising before that date. Section 300aa-11(a)(6) thus deprives the court of jurisdiction over petitioners' claim. In this case, the court correctly noted the jurisdictional defect and dismissed the action. See Fed. R. Civ. P. 12(h)(3).

4. Finally, petitioners argue that application of Section 300aa-11(a)(4)-(6) to dismiss this claim violates their constitutional rights to equal protection and due process of law. Pet. 37-38.

Petitioners' equal protection challenge is directed at the Act's compensation scheme. As outlined previously (pages 2-3, *supra*), subparagraphs (4)-(6) of subsection 11(a), 42 U.S.C. 300aa-11(a), describe the situations in which persons who suffered vaccine-related injuries prior to the effective date of the Pro-

gram may be eligible to file a petition for compensation. Individuals who instituted suit before compensation was available under the Act, but did not receive any compensation as part of the resolution of that suit, were allowed to file a petition under the Program. Section 300aa-11(a)(4). Similarly, persons whose pending actions had not yet proceeded to judgment were permitted to dismiss those actions and enter the Compensation Program. Section 300aa-11(a)(5). Finally, persons who were injured before the effective date of the Program, but had not yet sought compensation in any forum, were put on notice that their decision to file suit would preclude them from participation in the Program. Section 300aa-11(a)(6). Thus, in the three situations described in subparagraphs (4)-(6), all persons who suffered vaccine-related injuries before the effective date of the Program and who had not yet collected damages were given one opportunity to petition for compensation, but were precluded from pursuing simultaneously a private suit and a petition for compensation.

Petitioners assert that the compensation scheme is irrational because persons in petitioners' position—those injured before the compensation Program's effective date who filed a civil action after compensation under the Program became available—are "not given the same choice as others injured before the Program's effective date to enter the compensation program in lieu of [a] civil action." Pet. 46. That assertion is untrue. Persons like petitioners were in the position to choose, at the time they filed a civil action, between filing a petition for compensation under the program or seeking judicial relief. In contrast, persons who filed a civil action before Program benefits became available did not

have the opportunity, at the time of filing, to seek compensation under the Program instead of pursuing a civil action; relief was available only through an action in court. Permitting those persons to withdraw a previously filed civil action and seek Program compensation provides them with a choice between two avenues of relief—the same choice that was initially available to petitioners.

Petitioners also argue that the statutory scheme violates their right to due process of law because it forced them either to "forego[] their federal claim for compensation by filing a state court action or risk losing their right to recover against the State of Oklahoma by not strictly complying with state filing deadlines." Pet. 57. This argument is specious in light of the Vaccine Act's provision for the tolling of a state's statute of limitations upon filing of a petition for compensation under the Program. See 42 U.S.C. 300aa-16(c) (1988 & Supp. I 1989); note 5, *supra*. Thus, if petitioners had first filed a petition for compensation under the Program, any claim they might have against the State of Oklahoma would have been preserved under this Section.[6] As it is, petitioners have not been deprived of all opportunity to seek relief, since they now have pending a civil action in state court against the State of Oklahoma which involves the same DPT inoculation that is the subject of the instant proceedings.

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[6] Petitioners' suggestion (Pet. 55-56) that Section 300aa-16(c) is ambiguous with respect to a suit against the state itself is unavailing. The clear language of Section 300aa-16(c) tolls the limitations period for *all* actions arising under state law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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